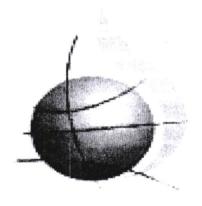
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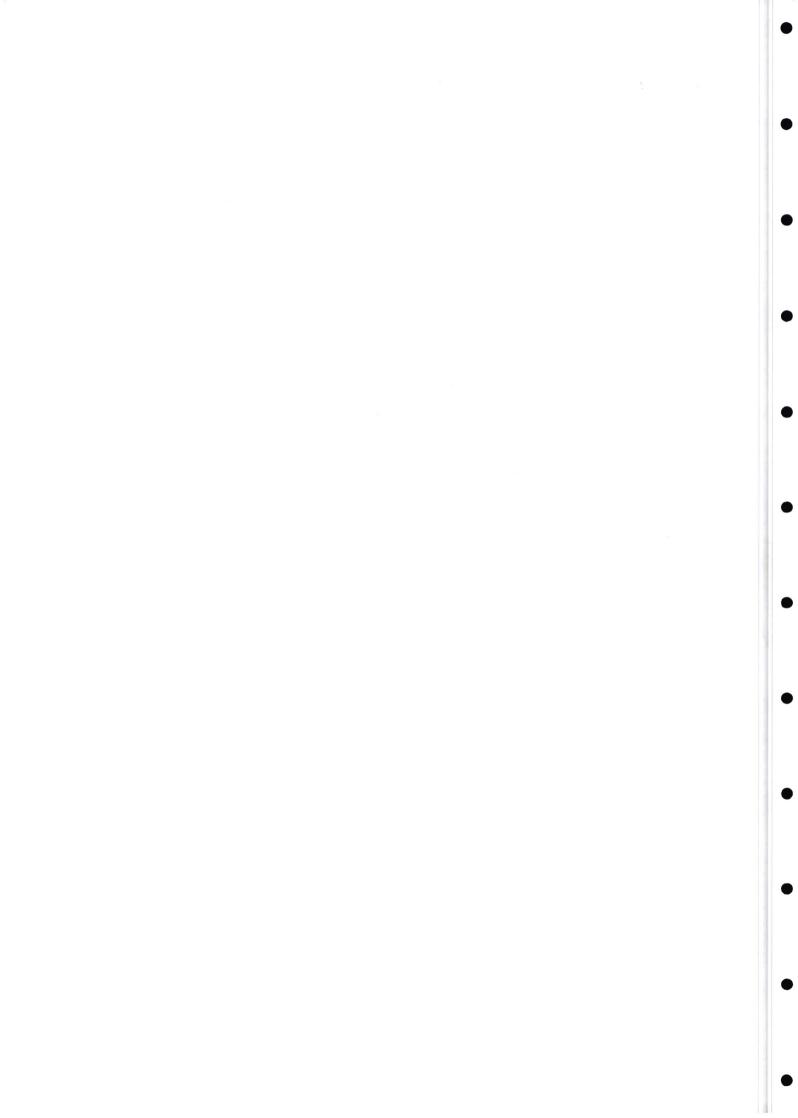
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THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

FAMILY LAW MONITORING AND TRIAL OBSERVATION REPORT

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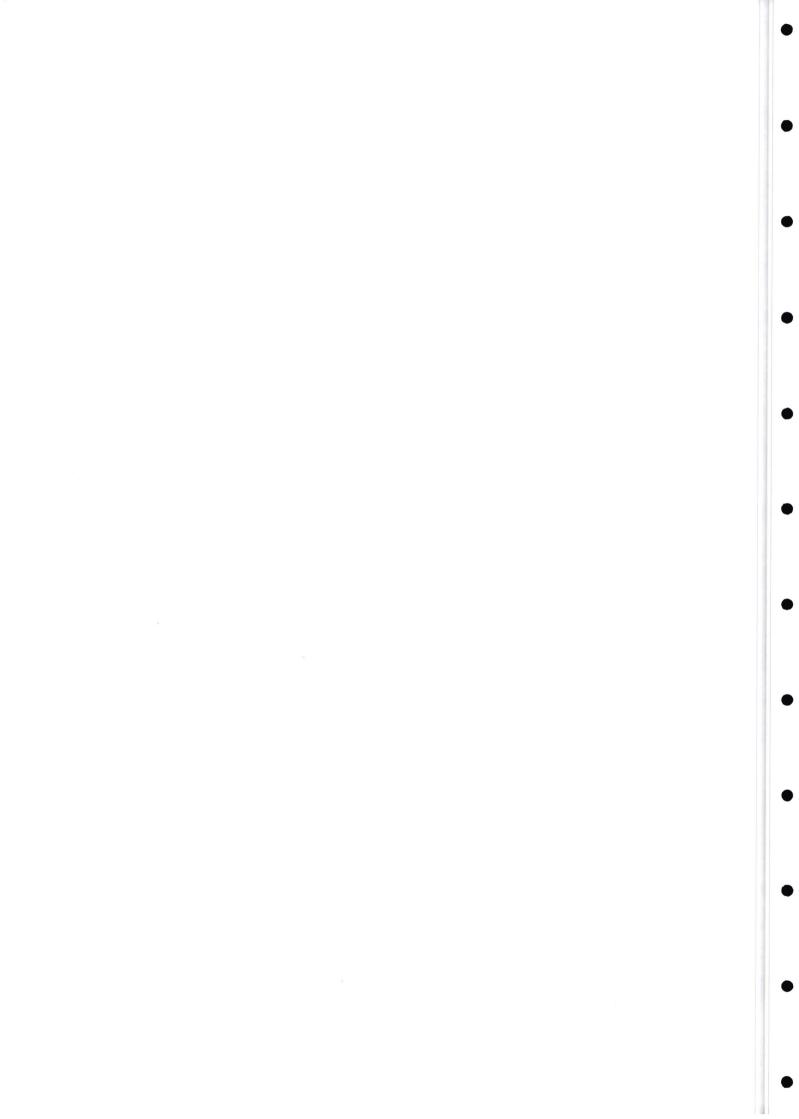
ACKNOWLEDGEMENT

The Kenyan Section of International Commission of Jurists thanks the judicial officers and advocates in Nairobi, Mombasa and Kakamega who voluntarily participated in this exercise and shared their valuable knowledge and experiences on gender and justice issues. ICJ Kenya also acknowledges the support received from officers at the Kadhi's Court in Mombasa.

ICJ Kenya also thanks all the Non Governmental Organisations, Community Based Organisations and Civil Society Organisations that participated in this exercise and shared their practical experiences on the ground with specific reference to women's property and inheritance rights and women's rights in general.

Lastly, ICJ Kenya extends its gratitude to CIDA GESP through whose financial support this exercise and the entire Women's Property and Inheritance Rights Project was made possible.

Philip Kichana Executive Director



SUMMARY OF THE PROJECT

Pursuant to its mandate of protecting and promoting human rights for all, democracy and the rule of law, ICJ Kenya organises various programmatic activities that focus on key themes that seek to protect and promote one or more of the three broad areas of human rights, the rule of law or democracy. In line with this organisational objective, ICJ Kenya chose among other areas to focus on the status of women's rights in Kenya with specific reference to women's property and inheritance rights, in recognition of the crucial role that women play in the society despite their ubiquitous marginalization in key decision-making policies and processes.

In 2001 ICJ Kenya undertook a Women's Property and Inheritance Rights Project, under its Judiciary Programme. The project was funded by USAID Washington, through a Small Grants Programme administered by Development Alternatives Inc. (DAI). The project sought to strengthen the legal protection and enforcement of women's property and inheritance rights in Kenya by developing strategies and mechanisms for entrenchment of women's property and inheritance rights in Kenya especially through the formal courts, using the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)¹ as the standard of measure. The project was implemented in collaboration with the Kenya Magistrates and Judges Association (KMJA).

At the end of the initial grant in July 2002, ICJ Kenya carried on with the project with financial assistance from the Canadian International Development Agency, Gender Equity Support Programme.

¹ Kenva is a signatory to and has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the one international treaty that encompasses most women's rights. CEDAW clearly addresses women's property and inheritance and provides that state parties shall ensure on a basis of equality of men and women the same rights for both spouses in respect for the ownership acquisition, management, administration, enjoyment and disposition of property whether free of charge or for valuable consideration.

The Project seeks to advance women's property and inheritance rights in Kenya bearing in mind that women do not currently enjoy the same property and inheritance rights as men which is mainly attributed to discriminatory cultural practises, attitudinal biases, inadequate laws and lack of gender equity policies.

Customary laws in Kenya are fundamentally discriminatory against women. In most communities property belongs to the males and is under the care of a male guardian; the father, the brother or the husband at all times. Women have security of land tenure only as wives and daughters during the lifetime of their parents.

The shortcomings of Kenya's legal system are evident especially with regards to women's property and inheritance rights. Kenya still relies on the English Married Women's Property Act of 1882 and has yet to decide with certainty whether relevant developments in English Law should be applied in Kenya.

However, it is encouraging to note that the draft constitution lays emphasis on compliance to international human rights standards and therefore ICJ Kenya shall continue with its efforts of sensitising judicial officers and the public on International treaties ratified by Kenya. This particular project seeks to empower judicial officers, advocates and litigants to use CEDAW as a genuine source of reference for application in cases where the current law needs to be additionally interpreted.

Under the current grant, ICJ Kenya organised a jurists conference in 2003 which sought to review the impact of the legal regime and government policies that promote or hinder women's rights in Kenya. Needless to say these two frameworks are key to women's access to justice, and are essential tools used to deny, obstruct, condition availability or promote access.

In Kenya for instance, women constitute over 50 % of the population, but are among the most illiterate and poorest in the country. Other than being subjected to cruel treatment ranging from domestic

violence, forced marriages, female genital mutilation, to wife inheritance among others, it has been statistically computed that only 5% of women in Kenya own land while 80% work on land that they do not own². This situation arises due to customary laws and practices, which conspire to stifle the right of women to own land. Moreover they disinherit and dispossess women of their right to property both at birth and in marriage.

In addition to the conference and other activities, ICJ Kenya conducted monitoring and trial observation exercise to assess,

- The impact of the Family Case Law Digest it had developed through interviewing members of The Judiciary, legal practitioners, litigants and the public.
- Acquaintance of CEDAW provisions by judicial officers, advocates and other players such as NGOs and CSOs/CBOs.
- The protection and promotion of women's rights on the ground by having first hand experience with workers based in the fields.
- The number of cases instituted by women in the formal courts; the type of cases and the challenges they face.
- The treatment accorded to women as judicial officers, advocates and litigants, among others.

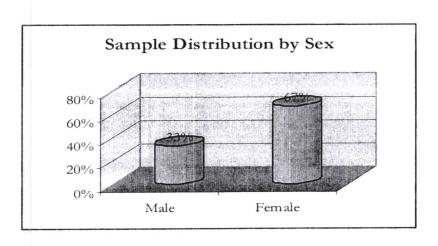
The findings of this exercise that was carried in Nairobi, Mombasa and Kakamega between July 2003 and March 2004, form the basis of this report.

Philip Kichana Executive Director

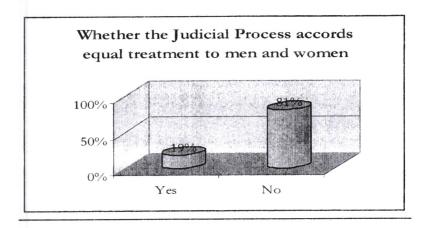
² Human Rights Watch: Women's Property Rights Violations in Sub-Saharan Africa

FAMILY LAW MONITORING EXERCISE

A total of fifty one (51) people including 12 judicial officers were interviewed during this exercise. It comprised of seventeen (17) male and thirty four (34) female.



81% of the respondents thought that the judicial process was biased and hostile towards women as compared to men due to various factors chief among them being cultural biases and women's own lack of knowledge of their rights.





Majority of the respondents stated that though the courts are open to both men and women, women are more disadvantaged, because of illiteracy and heavy cultural influence. It was observed that even those who are literate and empowered are usually intimidated into forfeiting their rights whenever they dare to use formal courts to enforce these rights due to cultural influence that is heavily inbuilt throughout the judicial system itself and the society at large. Rape cases were cited as some of the incidences where the judicial system is unfair and unfriendly towards women.

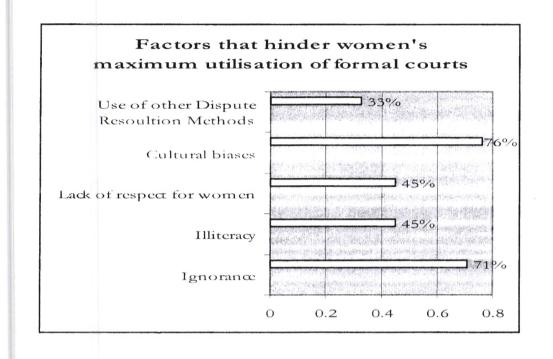
Main factors that undermine women's treatment in courts include *inter alia*,

- Cultural biases owing to the patriarchal setup of our society
- Illiteracy. Due to inadequate knowledge of their rights women usually do not know how to effectively use the judicial system to either protect and or enforce their rights.
- Poverty/Lack of resources.
- General lack of respect for women
- Inadequate, discriminatory and unfriendly³, and complicated laws

Due to the above factors, all the respondents submitted that women do not adequately use the judicial system to protect, promote and enforce their rights.

³ Immigration laws were cited as some of the discriminatory and unfriendly laws towards women.



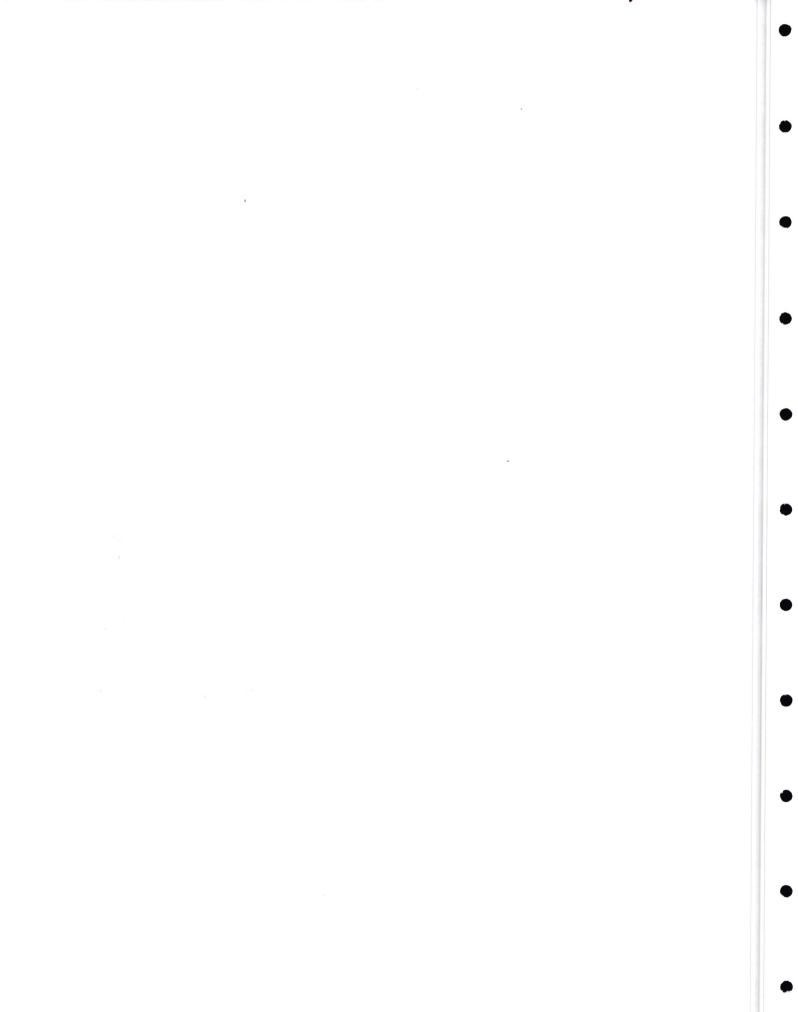


Majority of women especially in the rural areas prefer to go to village/community elders, chiefs and religious leaders to resolve their disputes even though most of these people and the system itself are gender-insensitive.

On the issue of inheritance and property rights, an overwhelming majority of the respondents submitted that the law does not adequately cater for women.

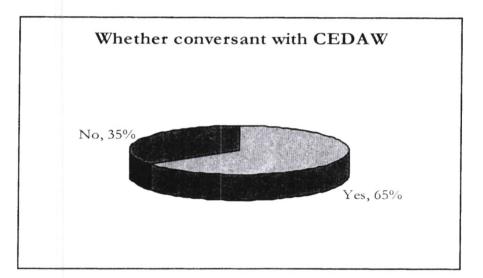
They said that there is need for enhancement of the current laws as well as vigorous and concerted efforts geared towards raising awareness on the same across the society.

Majority stated that the current law was inadequate and there was even less case law to refer to. There was a proposal that family courts be established in all the provinces.



CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

65% of the respondents stated that they were conversant with the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW). Most of the judicial officers stated that they had seen it for the first time in ICJ Kenya's Family Law Case Digest and also during ICJ Kenya's training sessions. However, virtually all NGO/CSO representatives in Mombasa and Kakamega had not heard or seen the Convention⁴. However, it was impressive to note that their Nairobi counterparts were conversant with the Convention. These findings revealed that there is a yearning gap in awareness campaign on most of the international instruments at the grassroot level.



All respondents agreed that CEDAW should be domesticated and applied in Kenya's municipal laws. They said unless this is done, there is very little the Judiciary can do in enforcing the Convention. They were in agreement that domestication of CEDAW would greatly improve the status of women's rights in Kenya.

⁴ ICJ Kenya donated numerous copies in these places.

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Initiatives to be considered in the Domestication Process

- The need for intense lobbying targeting all members of society and particularly parliament to domesticate CEDAW.
- There is also need to push for judicial activism.
- Encourage advocates to file test cases so as to develop a comprehensive jurisprudence around women's rights and use CEDAW as a persuasive authority.
- Introduce a comprehensive and compulsory international law/human rights course in law schools to equip the prospective lawyers and judicial officers with adequate knowledge of these instruments at an early stage. It was also proposed that such a course be introduced in police training.
 - Push for the passing of the provision in the draft constitution that calls for automatic domestication of all instruments signed and ratified by Kenya.
 - Review all acts that are inconsistent with the treaty such as the land laws and succession laws.

CONCLUSION

Majority of the respondents proposed that a comprehensive Family Law Act be enacted. Some of the magistrates who were interviewed lamented that some decisions of the superior courts were outrageous and ridiculous yet were binding to the lower courts making it difficult at times for the magistrates to promote and protect interests and rights of women.

All the respondents supported affirmative action initiative.

Lack of legal services especially in the rural areas was cited as one of the major hindrances towards the attainment of women rights in Kenya. It was observed that there was no single organization that was offering legal services including basic training in the whole of the Western province. Majority of the respondents called for the

establishment of a national legal aid scheme to help women access formal courts.

Majority of the respondents also proposed that the ratification process be changed to involve members of the public right from the beginning. This will ensure that, Kenya only accedes and ratifies those instruments that Kenyans want and will therefore compel the government to enforce and implement them once they have been ratified.

WAY FORWARD

- ICJ Kenya in conjunction with other interested organisations such as FIDA Kenya and LSK prepare policy papers and bills on the status of women's rights especially on property and inheritance rights and present them to the government and parliament for consideration
- ICJ Kenya kick start the campaign for CEDAW domestication countrywide. This can be done by preparing simple booklets/pamphlets on CEDAW for distribution throughout as well as conducting trainings on the same; sensitising members of parliament on CEDAW and the need for its domestication; continue with sensitization process for judicial officers and lawyers and encourage them to use CEDAW as a persuasive authority while awaiting its domestication.
- ICJ Kenya lobby for a revision of the ratification process so as to involve the citizens.
- Lobby for the establishment of women's desks in all police stations to deal with women issues.
- Lobby for standard formats for pleadings on women and children matters to make it easier for them to fill.

TRIAL OBSERVATION

In the course of this exercise, ICJ Kenya took time to observe how trials were being conducted and also had audience with some of the judicial officers to share their experiences. ICJ Kenya also sought to establish specifically the number of cases that touched on property and inheritance rights and women's rights cases generally that each judicial officer handled.

On the issue of accessibility to the formal courts, majority of the magistrates interviewed stated that they handled sixteen (16) and more cases in a month that were instituted by women⁵. Both the magistrates and advocates observed that there has been tremendous improvement in the last ten (10) years in this regard, a fact that they attributed to the empowerment and enlightenment of women of their rights. It was further observed that most of the domestic related matters are filed by women directly, while succession matters are mainly instituted through advocates.

It was observed that most of the cases that were instituted by women were

- Family Law cases⁶
- Land disputes

- DIVORCE/MATRIMONIAL CAUSES: In 2003, no such cases were filed.
- MISCELLANEOUS APPLICATIONS: This involves land matters and are filed by advocates who seek judicial review irrespective of the jurisdiction and to appeal out of time. No such cases were filed in 2003.

⁶ Family law cases include: Succession cases, Adoption and Guardianship suits, Divorce, Separation and Matrimonial cases, Matrimonial Property cases, Care and Custody of mentally ill persons, Customary Marriage and Presumption of Marriage cases and Spouse Burial Disputes.

⁵ Other than the High Court Registry at the Kakamega Law Courts and the Kadhi Courts in Mombasa, ICJ Kenya was not able to access the other registries to establish exactly how many cases are filed and the ratio of female litigants. These were ICJ Kenya's findings at the High Court Registry in Kakamega,

[•] SUCCESSION: In 2003, there were 554 succession cases filed. 98% were filed by the parties directly, ³/₄ who were women.

[•] CIVIL SUITS: In 2003, only 89 civil cases were filed involving mainly land and damages issues. The land matters centred on ownership wrangles and matters to do with adverse possession. Of these cases, majority of the parties were men who filed through advocates.

[•] CIVIL APPEALS: 144 civil appeals were filed in 2003. These appeals were mainly on land matters and accident claims. Majority of the litigants were men.

- Succession disputes
- Criminal cases especially assault and rape cases

Throughout the observation, no single international instrument was cited in any of the cases and most of the people who appeared in court especially in Kakamega and lower courts in Mombasa were unrepresented.

In Mombasa, it was observed that most of succession cases were being handled in the Kadhi's court owing to the great percentage of Muslims in the region. A visit to the Kadhi's Court revealed the following⁷:

- In Muslim Sharia law, there is no inheritance for illegitimate children and that a divorced wife has no share in the estate of her former husband.
- A wife is entitled to an eighth (1/8) of the husband's estate. In a situation where there are more than one wife (maximum of four), they still share the eighth (1/8) of the husband's estate. This is clearly set out in their law based on the Koran.
- The remaining portion (7/8) of the estate usually goes to the children save where there are living parents of the deceased, in such a situation, each of the parents is entitled to a sixth (1/6) of this portion.
- Division among the children is as follows, the male child gets twice the share of the girl child. For instance, where there are 2 sons and 1 girl, the property will be divided into 5 equal parts with the boys getting 2/5 each while the girl gets 1/5. Thus women under the Islamic law are entitled to inherit property whether they are married or not.
- The male child can inherit all the estate once both parents are deceased but a girl child cannot. In a situation where there is only a girl child, she entitled to a half (1/2) of the property while the

⁷ Since division of property is clearly set out in the Koran, there are no questions to be raised and every bit is followed to the letter.

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remaining half goes to the deceased's brothers and sisters but only if the parents are dead.

- Adopted children are not entitled to inherit anything but can only get a share in form of a gift which is issued before the parent dies. This share can never exceed a third (1/3) of the total property. Here therefore, a will is required.
- Where the wife predeceases a husband, the man is entitled to a quarter (1/4) of her property. The remaining part goes first to her living parents followed by the children in the ratio of male child getting twice the girl child's share as already stated above.
- A wife with no children gets a quarter (1/4) of her husband's estate. She is given a greater part as it is considered that she does not have someone to tend to her.

CHALLENGES ENCOUNTERED

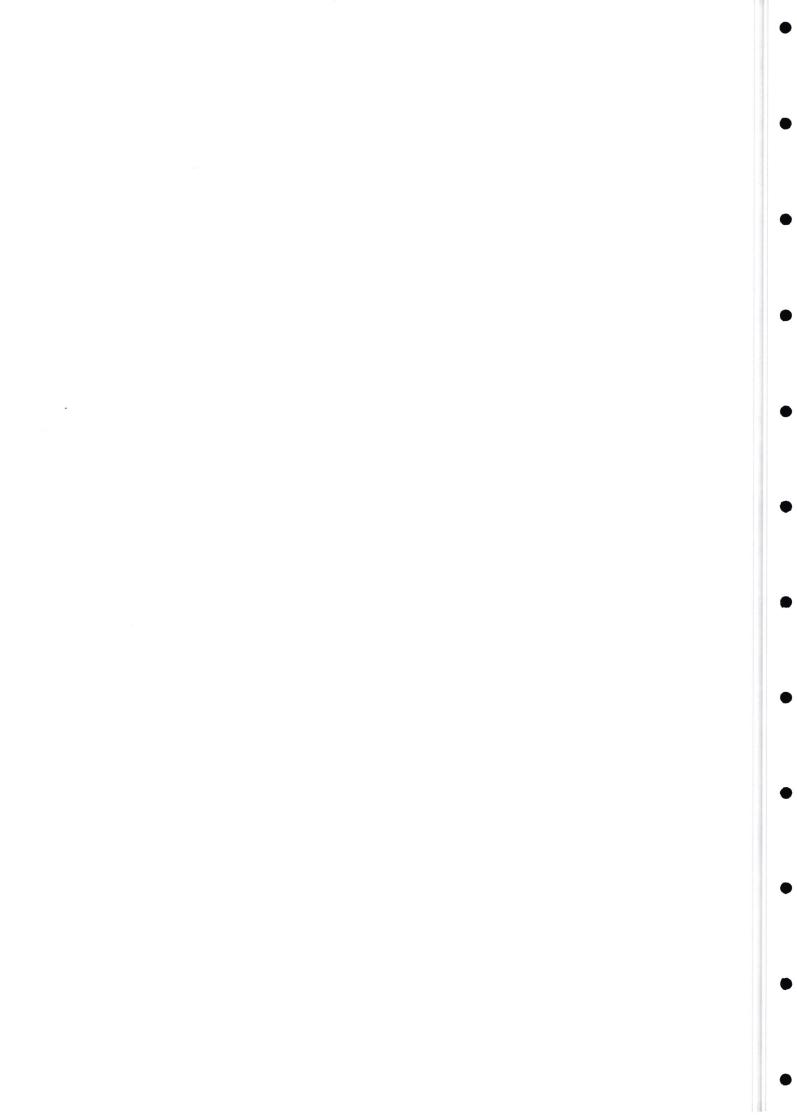
- Communication breakdown was a major hindrance to the success of the exercise especially in Kakamega and Mombasa. Most of the phone lines were dysfunctional making it difficult to communicate and access most of the organizations.
- The judiciary 'purge' subsequent to the Ringera report also affected the exercise in the following ways, most judicial officers were unwilling to participate in the exercise because of fear; since most judges had been suspended valuable source of information went with them and those who remained were either overwhelmed with the work pressure and/or were afraid to simply talk to 'strangers' for fear of the unknown. This affected ICJ Kenya's accessibility to the Family Division of the High Court which would have offered valuable information on women's rights since it tackles most of the issues that touch on these rights. In most stations, matters had been stood over generally while the High Court went through the motions of taking dates and rescheduling matters adversely affecting the trial observation exercise.
- Most of the NGOs/CBOs/CSOs in the rural areas were mainly involved in economic and health initiatives as opposed to legal

issues, which offered an enormous challenge of filling in the vacuum. Further, there were very few advocates in Kakamega and Mombasa compared to the demand for legal services in these areas.

 Leading human rights organisations in Mombasa namely, Muslims for Human Rights (MUHURI) and Coast Rights Forum (CRF) were going through restructuring process which affected our audience with them.

GENERAL KEY OBSERVATIONS

- In Kakamega and Western province in general, poverty level especially amongst women is very high. This being an agricultural area it is the women and girls who carry out the actual farming activities such as planting, weeding and harvesting but it is the men who own and control land and therefore handles all the proceeds and dictates how the farm is to be used.
- Wife inheritance is still practised in western Kenya a factor that has perpetuated the spread of HIV/AIDS in the region.
- Incidences of discrimination against women in most Mombasa is rife, for instance women are often harassed by police officers when found walking unaccompanied at night and are always perceived as prostitutes. Nevertheless, prostitution is a major problem in this region mainly due to;
 - o Poverty
 - Abusive relationships especially for married women
 - Early marriages which usually don't last long
 - o Illiteracy
- It was established that squatter problem is rampant at the Coast, with about 70% of the population living as squatters. As a means of redressing the problem, an initiative known as 'House without Land' has been introduced, where people are allowed to built houses (mostly informal houses) at a fee on other people's land.



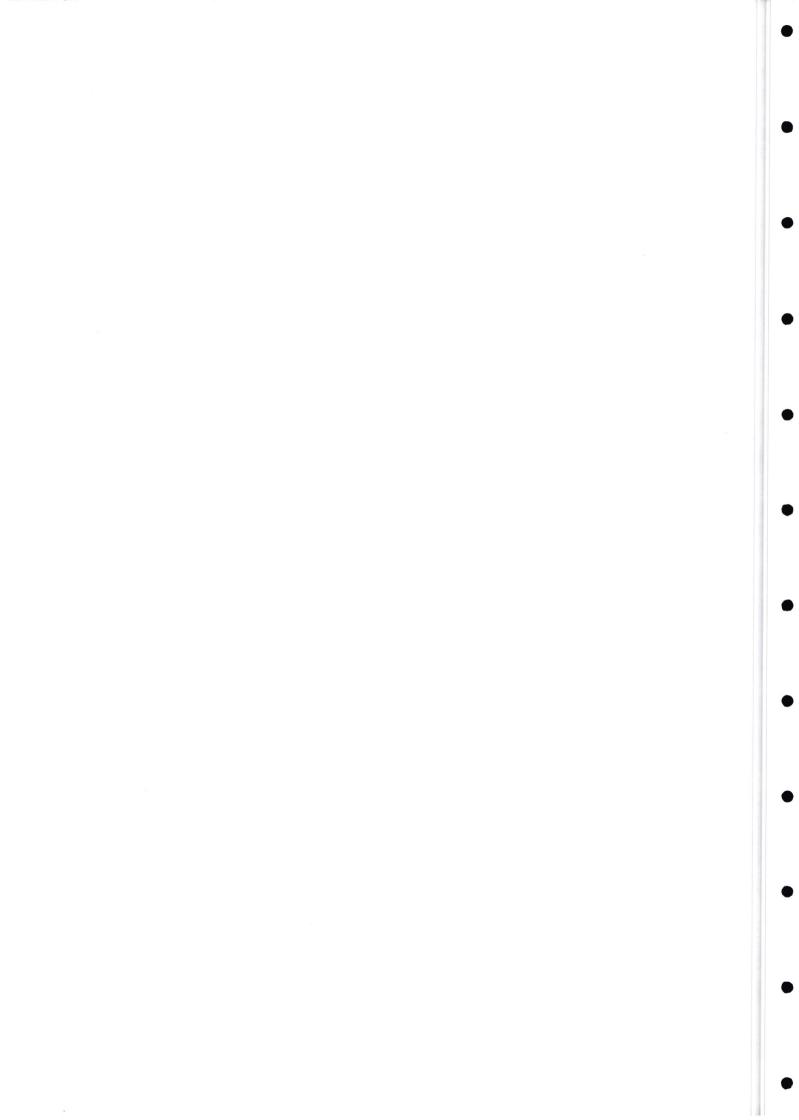
 There are generally very few organisations within the Coast region especially dealing with legal issues partly because the region is pre-dominantly Muslim hence tightly knit to penetrate and also because of natives' negative attitude towards 'foreigners' whom they perceive as opportunists who want to grab their resources.

LIST OF ORGANIZATIONS THAT PARTICIPATED

ORGANISATION	LOCATION	REMARKS
Serve Education Medical	Kakamega	It's an NGO set up through a church
Relief Programme	C	Ministry called Serve International
(SEMREP)		Ministry to deal with
		developmental issues. It runs the
Interviewees: Ms. Effie		following programmes/activities :
Imbali and Mr. Jairus		 Women's programme – Its
Lwoyero		concerned with women's
		economic empowerment. To
		date, SEMREP has
		empowered various women
		groups to buy land.
		However, these women still
		have to inform their
		husbands and include their
		names on the title deeds to
		avoid complications.
		• Medical programme – Provides
		medical services at a subsidised
		fee. The programme targets
		mainly children of between 0 –
		5years.
		• The other project is support for
		needy children especially HIV
		orphans and other neglected
		children. Under this project, a
		school has been set up to cater
		for these children's education.
Kazi Mashambani	Kakamega	KAMADEP is an NGO that was
Development		established in 1998 but registered in
Programme		2000. Its objectives include: -
(KAMADEP)		Poverty eradication
		• Capacity building, and
Interviewees: Mr. Morris		Job creation
Isiye (Programme		
Coordinator) and Mr. Charles Okwemba		It carries out the following
		programmes:
(Secretary, NGO Network		• Children's rights programme: -
Western Region)		A school outreach programme

Family Health International (FHI) Interviewee: Silas Wangila (Programme Officer) and Mildred Natecho (Lawyer)	Kakamega	 that trains teachers, church leaders and communities on children's rights as provided for in the Children Act 2001. They also educate the children on their rights through collaboration with KARCA. Women's rights programme: - Focuses on economic empowerment of women. It lends women money to start income generating projects. Water and Sanitation project: - Aims at providing water to the rural areas and proper sanitation for all. It deals with persons affected and living with HIV/AIDS. Their work is three-fold which involves prevention, care and support through the following objectives: - Helping women and men obtain access to safe, effective and affordable family planning services and methods. Preventing the spread of HIV/AIDS and sexually transmitted diseases (STDs) Improving the health of women and children. FHI also engages in paralegal project in conjunction with SWAK who have been trained by FIDA to deal with advocacy issues.
Institute of Research and Management (IRAM)	Kakamega	
IPEFAM Interviewee: Ms. Cyrilla Rakama, Founder	Kakamega	It concentrates on health rights by offering health services at a subsidised fee. It mainly offers support to women and children who are infected by HIV/AIDS.

ROSCA Feed the Orphans Programme (ROSCA F.O.P) Interviewee: Ms. Prisca Oulo, Founder	Butere/Mumias	Offers material support to orphans as a result of HIV/AIDS. It pays for their education and secures them income generating activities in addition to providing food. It also participates in sensitization activities on HIV/AIDS.
African Community Development Centre (ACDC)	Lugari	It is concerned with economic empowerment activities that target both men and women.
Interviewee: Mr. Mwembe Community Action for Rural Development (CARD).	Kakamega	It is concerned with economic empowerment activities that target both men and women. Its main activity is bee-keeping.
Solidarity with Women in Distress (SOLWODI) Interviewee: Lorna Rupia, Executive Director	Mombasa	It operates in Mombasa, Malindi and Kilifi. It targets commercial sex workers, including bar maids and commercial sex workers deported from German within the age bracket of 15 and 45 years old. Its main objective is to facilitate a process that will ensure that these women seek and engage in alternative means of earning a living. It does this through;- • Conducting vocational training. The training is carried out on partial donation as well as loan scheme. Upon completion of the training, the organization provides equipment to the trainees on loan basis, which loan must be secured. For the older women, they are trained in business skills and are encouraged to work through support groups which are officially



		 registered. So far there are about nine registered groups in Mombasa, and Malindi districts. Workshops to sensitize police officers and judicial officers on the plight of commercial sex workers; raise awareness among the commercial sex workers on judicial processes.
Action Aid Interviewee: Carolyne Hangil, Programme Officer - Gender	Mombasa	Action Aid works through Development Initiatives. It is currently present in Mombasa, Kwale, Malindi and Tana River districts. Its approach is to help communities in the implementation of projects which are usually mapped-out by the communities themselves, which mainly focuses on HIV/AIDS, gender and capacity building initiatives. Action Aid has identified a vacuum as far as addressing property rights in the Coastal region is concerned. In this regard, Action Aid has started working with other women organizations such as Sauti ya Wanawake to sensitize women on their rights.
Kituo Cha Sheria Interviewee: Mrs. Mwatu, Legal Officer	Mombasa	It mainly deals with land and labour rights issues. Majority of Kituo's clients are men since they are the ones who own land and are employed. It mainly offers Referral services through its network of volunteer advocates.

Women's Network Centre	Mombasa	It receives a lot of cases from women touching on domestic violence, inheritance and custody.
		The organisation aims at creating awareness on women's rights and targets women's groups in the region.
Christian Legal Education Aid and Research (CLEAR) Interviewee: Ms. Monique (Volunteer Legal Worker)		Was set up as a Trust by the Kenya Christian Lawyers Fellowship (KCLF) who have offices in both Nairobi and Mombasa. They provide legal education as well as legal aid through advice and pro-bono service. Their focus is family law matters especially on children issues. They deal with a lot of referrals especially from Women's Network Centre (WNC) and Federation of Women Lawyers (FIDA-Kenya).
ILISHE Trust Interviewee: Mr. Oketch Aoro (Administrator)	Mombasa	It started as a legal awareness programme organised by Kituo Cha Sheria for purposes of enhancing consumer and labour rights. It is a local Community based Organisation (CBO) which became a Trust in 1998. Twenty one (21) women's' groups are members of ILISHE Trust who joined because of the drive for economic empowerment ILISHE runs four (4) programmes: • Land and Shelter rights. This is vital in coast region given the land/ squatter problems. • Savings & Credit. Capacity building for on Income generating Activities (IGA's). • Education and training. This

		 awareness. Early childhood development. This deals with early childhood vis-à-vis the mother and her responsibility.
Child Welfare Association Interviewee: Ms. Susan Kuria (Administrator & Chair of NGO Forum Mbsa)	Mombasa	 This organisation deals with disadvantaged and/or abandoned children. These children are brought to their care through the local police department, the children's department and from the hospitals. It runs three (3) programmes : Adoption and Fostering. Running of children's homes. Rehabilitation of children. There are twenty one (21) homes run by the Child Welfare Association all over the country.
Kenya Human Rights Ccommission	Nairobi	
Institute of Economic Affairs	Nairobi	
Transparency Intrnational Kenya Chapter	Nairobi	
Kituo cha Sheria	Nairobi	
Centre for Governance	Nairobi	
and Development		
Law Society of Kenya	Nairobi	
CLARION	Nairobi	
ECWD	Nairobi	
Institute for Education in Democracy	Nairobi	
Collaborative Centre	Nairobi	
Gender and		
Development		
Winrock	Nairobi	
COVAW	Nairobi	
CRADLE	Nairobi	
Women and Law in East Africa	Nairobi	

The League of Kenyan	Nairobi	
Women Voters,		
Refugee Consortium,	Nairobi	
ANPCANN	Nairobi	
CREAW	Nairobi	
Econews,	Nairobi	
FEMNET,	Nairobi	
Legal Resources	Nairobi	
Foundation		
NGO Council	Nairobi	
Youth Agenda	Nairobi	
4C's	Nairobi	
National Council of	Nairobi	
Women Kenya		
FIDA Kenya	Nairobi	
Urgent Action Fund.	Nairobi	

